

## International Arbitration – A Comparative Essay

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**Abstract.** An analysis of international arbitration indicates that, *prima facie*, certain crucial differences between the continental approach and common law practice exist. The main differences relate to the general hearing (written/verbal), the position of the parties in relation to the arbitrator, the proof-taking procedure, the duty to give reasons for the decision, and the division of competences between the judiciary and the arbitrator. On the other hand it must be pointed out that the main trends in international arbitration lead to a blurring of these differences. In particular mention may be made of the *lex mercatoria*, reduction in judicial control, and the evolution towards transnational arbitration.

**Résumé.** Quand on étudie l'arbitrage international, on s'aperçoit au premier abord qu'il existe des différences essentielles entre l'approche continentale et la pratique de *common law*. Ces différences se manifestent *spécialement* en ce qui concerne les règles générales relatives aux auditions (écrites/orales), la situation des parties à l'égard de l'arbitre, le droit de la preuve, la force obligatoire de la décision et la division des compétences entre le judiciaire et l'arbitre. D'un autre côté, on doit constater que les tendances fondamentales en matière d'arbitrage international contribuent à l'effacement de ces différences. On peut spécialement se référer à la *lex mercatoria*, aux restrictions misus au contrôle judiciaire et à l'évaluation vers un arbitrage *transnational*.

**Zusammenfassung.** Analysiert man das internationale Schiedsgerichtsverfahren, bemerkt man auf den ersten Blick wesentliche Unterschiede zwischen der Methode des continentalen Rechtskreises und der Praxis im Bereich des *common law*. Diese Unterschiede treten besonders in Hinblick auf die allgemeine Anhörung (schriftlich/mündlich), die Stellung der Parteien im Verhältnis zum Schiedsrichter, das Beweisverfahren, die Pflicht, die Entscheidung zu begründen, und in Bezug auf die Aufteilung der Kompetenzen zwischen der Gerichtsbarkeit und dem Schiedsrichter auf. Auf der anderen Seite muß man feststellen, daß grundlegende Tendenzen in internationalen Schiedsgerichtsverfahren dazu beitragen, die Unterschiede zu verwischen. Diesbezüglich kann man insbesondere auf die *lex mercatoria*, die Einschränkung gerichtlicher Kontrolle und die Entwicklung zu transnationalen Schiedsgerichtsverfahren hinweisen.

### Introduction

1. Some years ago, I acted as chairman of an international arbitration case whose proceedings took one year in all to complete.

The terms of reference were endorsed by the arbitrators and the parties in question by means of written correspondence, and two hearings were held; one

of these concerned preliminary questions, i.e. formalities, limitation periods and procedural deadlines. whereas the other related to the substance of the case, each hearing lasting two days. The lawyers on both sides were German nationals and dealt with the arbitration proceedings with a good deal of thoroughness and a touch of fantasy. Both the procedural and substantive law which applied in this case were of the Continental type.

Recently, a German colleague related to me the story of an arbitration case which had in part been conducted, to all practical intents and purposes, in accordance with standard common law proceedings and lasted eighty days. These proceedings consisted of a succession of hearings whose duration varied between one and two weeks, and which successively dealt with procedural objections, establishing which party was, in principle, to be held liable, the size of the damages awarded, individual claims, and finally, the allocation of costs. The lawyers representing each party were common law lawyers, trained in the Anglo-Saxon legal system, which meant, *inter alia*, that the oral proceedings as well as the speeches in practice constituted the oral reflection of the contents of the documents and pleadings submitted for the purpose of the hearing.

Crucially, half the amount of time taken up by the proceedings was devoted to the questioning and the cross-examination of the witnesses and of legal experts.

Although the comparison made here is one between two relatively extreme cases of arbitral proceedings applied in accordance with Continental and Anglo-Saxon *practice*, I am of the opinion that it constitutes a suitably impressionistic introduction to this paper on international arbitration.

2. Although this report will not dwell any further on either the history of Anglo-Saxon law or on judicial organisation. I would nevertheless venture, by way of introduction to a brief comparative study of the Continental and Anglo-Saxon legal system<sup>1</sup> relating to international arbitration, to set each of these systems in their appropriate context.

(a) The principle of 'due process of law' is based on English law. It is featured, in Norman French, in the Statute 28 Edward III c.3 (1354) and makes reference to an independant judiciary, the principle of a fair hearing, access to the courts, the absence of any form of pressure, be it of a political,

<sup>1</sup> Any comparison made with the common law of arbitration will in practice be confirmed to English law (i.e. the legal system of England and Wales). For a more analytical comparative study, cf. the contributions in the Collection dedicated to A. FETTWEISS, *L'arbitrage, travaux efforts du professeur Albert Fettweiss*, Brussel, 1990.

social or judicial nature, and the availability of advice and assistance from an independently organised legal profession.

(b) English law is primarily lawyer's law, i.e. law which has been fashioned by legal practitioners, lawyers and judges.

(c) Procedural rules under the current Anglo-Saxon system remain subject to the adversarial principle. However, there have recently occurred certain world trends in favour of a more interventionist role by the judge.<sup>2</sup> Nevertheless, this adversarial principle is based primarily on the fundamental role played by the legal counsels of the parties who must endeavour to win their case before the judge. One of the consequences of this is that neither time nor money is spared in conducting a case.<sup>3</sup>

(d) In the context of what has been stated above, particular attention must be drawn to the crucial role played by rules of procedure. In the words of Rene David:

Nevertheless, in the eyes of common lawyers, rules of procedure are all-important. The overriding concern in seeking to resolve a dispute is that the court proceedings be conducted in a fair manner and that certain rules, regarded as indispensable in the administration of justice, be observed. In the light of this requirement, the correct application of the law which governs the substance of the case is a secondary matter. This way of thinking cannot fail to influence the manner in which arbitration is approached. Whereas on the European continent an essential distinction is drawn between the arbitrator whose ruling is based on the law and the arbitrator whose ruling is based on considerations of fairness, this distinction, which concerns the very basis of the law, is unknown in the common law countries. The lawyers' concern will be primarily for rules of procedure: they will seek to ensure above all that the arbitrators have conducted proceedings in a fair manner, and that no 'misconduct' can be attributed to them in the manner in which they have conducted these proceedings.<sup>4</sup>

<sup>2</sup> Cf. on this subject: M. STORME & D. COESTER-WALTJEN, "L'activisme du juge / Der Aktivismus des Richters", in: *General Reports of the IXth International Congress on Procedural Law, Coimbra 1991*, Pessoa Vaz ed., 1991, in the course of being published.

<sup>3</sup> For an example of this characteristic in arbitration proceedings, cf. W. KUHN, "Praktische Erfahrungen im englischen Schiedsverfahren", in *Handelsschiedsgerichtbarkeit in England und in der Bundesrepublik Deutschland*, 1987, Köln, p. 97 et seq., in particular pp. 100–103.

<sup>4</sup> R. DAVID, *L'arbitrage dans le commerce international*, Paris, 1982, 149.

3. Where arbitration is referred to as meaning a method of private judicial decisionmaking, one possible reaction could be to consider that this is purely a private matter between the parties concerned, who must be left to fend for themselves. Parties who have opted for arbitration have made a definitive choice, and should not be allowed to bother the public courts before, during or after the arbitration proceedings in question.

It is in England, more than anywhere else, that this fundamental approach, which is a perfectly logical one, has formed the basic idea underlying the law of arbitration.<sup>5</sup> Since those days, however, the need for a highly sophisticated system of arbitration has given rise to a complex network of rules, in which the relationship between the arbitrator and the public courts occupies a particularly crucial place.

Before considering the various differences in greater detail, I should, for the sake of completeness, start by posing the all familiar question: does arbitration form part of the law of contracts or of the law of procedure?

Personally, I am of the opinion that, however many areas of overlap or of autonomy it is possible to discern in this particular field, arbitration has more in common with the law of procedure than with the law of contracts,<sup>6</sup> since it is the intention of the parties to subject their dispute to a special type of judicial body. Although initially a different approach prevailed in England, this is probably the viewpoint which is adhered to in that country at present on pragmatic grounds,<sup>7</sup> since issues which relate to fundamental metaphysical questions, are normally dismissed by the British as being 'Continental questions'.<sup>8</sup>

### **Points of comparison and differences between the continental and the common law arbitration**

4. On the Continent, arbitration has, since time immemorial, been regulated by the legislator. Also, most of the innovations in the law of arbitration were introduced in the 1980s, at a time when England had already set the trend with its recent Arbitration Act 1979.

It is interesting to note in this context that in a number of common law countries, common law arbitration proceedings can still be conducted in

<sup>5</sup> Cf. M.J. MUSTILL & S.C. BOYD, *The law and practice of commercial arbitration in England*, London, 1982.

<sup>6</sup> M. STORME, "Contractuele mogelijkheden om geschillen alternatief op te lossen", in Storme, Merchiers and Herbots, *De overeenkomst vandaag en morgen*, Antwerpen, 1990, p. 565 et seq., in particular p. 585.

<sup>7</sup> A. KASSIS, *Problèmes de base de l'arbitrage*, Paris, 1987, p. 261 et seq.

<sup>8</sup> Cf. J. GUITTON, *Un siècle, une vie*, Paris, 1989, in a conversation between Lord Halifax and Sir Winston Churchill.

accordance with the common law, which exists side by side with the rules laid down by statute (currently in England the Arbitration Acts of 1950, 1975 and 1979).

Since common law arbitration is only infrequently applied I merely mention it for the benefit of the curious without elaborating any further on it.<sup>9</sup>

Apart from this marginal area, it is necessary to know that the English law of arbitration continues to be governed by three sources of law: legislation (the Arbitration Acts), the parties' agreement and the common law.<sup>10</sup>

5. Naturally, we must not lose sight of the fact that on the Continent, many arbitration proceedings enjoy the assistance of arbitration centres (Cepina in Brussels, NIA in the Netherlands, and, at the international level, CCI-ICC in Paris), which have their own rules of arbitration which are accepted by the parties. Where no reference is made to any institutional arbitration, we are dealing with an 'ad hoc' arbitration panel.

England also has its many arbitration centres – e.g. the London Court of International Arbitration, LCIA – but the number of non-institutional arbitration proceedings is probably much higher in this country than elsewhere.

6. The methods by which arbitrators are appointed reveal no appreciable differences. However, the practice of appointing single arbitrators is higher in England than on the Continent.

Contrary to the principle, applied elsewhere, that an uneven number of arbitrators should be appointed (cf. for example Article 1681 (1) Belgian Judicial Code), the most interesting feature of the English system is the practice of appointing two arbitrators, who must only appoint a third arbitrator, i.e. the umpire, in the absence of agreement between them.

The same principle operates in relation to certain courts which, when hearing appeal cases, sit with two judges, and a third judge is added only where a disagreement arises between the original two.<sup>11</sup>

This is, in my view, an excellent principle, which is particularly suitable from the point of view of procedural economy, in relation to both arbitration panels and the public courts.

7. It is normally held that on the Continent, a distinction is maintained between the arbitration rulings made in accordance with the law, and arbitration rulings

<sup>9</sup> Cf. on this subject: R. DAVID, *L'arbitrage dans le commerce international*, Paris, 1982, p. 150 et seq.

<sup>10</sup> Cf. M.J. MUSTILL & S.C. BOYD, *The law and practice of commercial arbitration in England*, London, 1982, p. 6–7.

<sup>11</sup> For example in the Court of Appeal: J. JACOB, *The Fabric of English Civil Justice*, London, 1987, p. 220.

made on the basis of considerations of equity (*amiable compositeur*), whereas the notion of the *amiable composition* does not exist in the common law.

Naturally, it is necessary to put in its proper perspective the use made of this institution on the Continent. Thus it will be found that it is not used in Belgium, unless a clause whereby it is agreed to “rule in accordance with equity” has been accepted by the parties *after* the dispute has arisen, and that this is done at the initial stage of the proceedings (Article 1700(j), Article 1683 Belgian Judicial Code).<sup>12</sup>

Moreover, on the other side of the Channel it is possible to make arbitral rulings without giving reasons, subject to agreement to the contrary and to the provisions of Section 1(5) of the 1979 Arbitration Act :

Subject to subsection (6) below, if an award is made and, on an application made by any of the parties to the reference,

(a) with the consent of all the other parties to the reference, or

(b) subject to section 3 below, with the leave of the court, it appears to the High Court that the award does not or does not sufficiently set out the reasons for the award, the court may order the arbitrator or umpire concerned to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought under this section, to consider any question of law arising out of the award.

Finally, Section 43 of the Arbitration Rules of the American Arbitration Association (AAA) stipulates that the arbitrator may give a ruling “which the arbitrator deems just and equitable and within the scope of the agreement of the parties”.<sup>13</sup> and there are increasing calls in England in favour of an *amiable composition* if accepted by the parties.<sup>14</sup>

8. As regards the conduct of the proceedings, it is possible to discern two approaches:

(a) either the parties determine the manner in which proceedings shall be conducted, and

<sup>12</sup> CCI/ICC figures show that, in the arbitration practice developed under its auspices, 1 to 4 per cent of cases are settled by way of *amiable composition*.

<sup>13</sup> Cf. T.E. CARBONNEAU, *Le droit américain de l'arbitrage*, in A. Fettweis, *L'arbitrage*, *o.c.*, p. 205 et seq.

<sup>14</sup> J. STEYN, “Towards a new English Arbitration Act”, *Arb. Int.*, 1991, p. 17 et seq., in particular p. 23–24.

(b) in the absence of any agreement to this effect, the conduct of the proceedings shall be imposed by statute or regulation, unless the parties have explicitly agreed that this shall not be so.

Here too, arbitration practice shows that whereas the first solution is that adopted in England and the second is that which applies on the Continent, this distinction is no longer as evident as it used to be; moreover, in England there are increasing calls for arbitration procedures to be imposed by statute rather than left to the parties.<sup>15</sup>

An interesting procedure which applies in England is that of the 'stay of proceedings'.<sup>16</sup> In most European countries, arbitration proceedings cannot be brought to a standstill by the public courts, as is illustrated by the provisions of Article 1679(1) of the Belgian Judicial Code, which states:

Where a court is seized of a dispute which is subject to arbitration, it shall disclaim jurisdiction to settle the case at the suit of one of the parties, unless this dispute is not governed by a valid agreement, or where such agreement has expired. Any plea to this effect must be raised before any other plea or defence.

On the other hand, the English court has discretion to decide whether or not a 'case of arbitration' of which they were seized may be continued before that court or must be terminated, as can be seen from the terms of Section 4(1) of the Arbitration Act 1950, which states

If any party to an arbitration agreement, or any person claiming through or under him, commences any proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, *may make*<sup>17</sup> an order staying the proceedings.

9. Of fundamental importance is naturally the procedural relationship between the court and the parties as it expresses itself in the English adver-

<sup>15</sup> J. STEYN, *op. cit. Arb. Int.*, 1991, p. 17 et seq., in particular p. 20.

<sup>16</sup> As regards the special rules which apply in international arbitration, cf. MUSTILL & BOYD, *op. cit.* p. 9.

<sup>17</sup> Emphasis added by the author.

serial principle, under which, although on opposite sides, the parties lead the proceedings<sup>18</sup> and the judge passively looks on. It is this relationship which will also be found in the relevant arbitration clause, since in England it is the parties which normally determine the speed of the proceedings and the method according to which they are conducted, whereas on the Continent, these aspects of the arbitration clause are largely a matter for the arbitrator to decide.

10. The largely oral nature of English arbitration procedures obviously has its origins in the jury system. Since the jury was only selected shortly before the opening of the hearing, both the facts and the applicable law needed to be extensively clarified orally, since this could not be done beforehand. As a result of this, everything, i.e. the facts, arguments, evidence and relevant documents, is explained orally on the basis that the judge knows nothing about the case before him.

All this entails that the English hearings are of considerable importance and of long duration,<sup>19</sup> whereas on the Continent, arbitral proceedings are in most cases prepared in extensive written form, and the hearing confines itself to a brief summary, provided by the parties, and questioning by the arbitrator, who will have prepared the case file very thoroughly in advance.

11. The above naturally also determines the nature of the evidence before the panel, particularly in relation to both the search for the truth as a principle and the manner in which this is achieved.

In my view, the best definition of the method by which the truth is ascertained on the Continent was given by Leo Rosenberg where he wrote:

So liegt das Wesen des modernen Zivilprozesses in einer Arbeitsgemeinschaft von Richtern und Parteien, die zusammen dafür zu sorgen haben, daß dem Richter die sichere Findung der Wahrheit ermöglicht und in einem lebendigen Verfahren der Rechtsfriede unter den streitenden Parteien wiederhergestellt und damit der Frieden der Allgemeinheit gesichert werde.<sup>20</sup>

In the common law countries, on the other hand, it is assumed that the search for the truth is best left to experienced lawyers who, on both sides, are

<sup>18</sup> Here, I have omitted the more sophisticated developments in this field, cf. on this subject M. STORME & D. COESTER-WALTJEN, in: *General Reports of the IXth International Congress on Procedural Law, Coimbra 1991*.

<sup>19</sup> However, they must be highly concentrated, i.e. restricted to one hearing – which will if necessary take up several weeks.

<sup>20</sup> L. ROSENBERG, *Lehrbuch des Deutschen Zivilprozessrechts*, 7. Aufl., München-Berlin, 1956, p. 6.



responsible for the collection and the production of evidence, and do so in an impartial manner: '*Truth is best discovered by powerful statements on both sides of the question*'.<sup>21</sup>

This is confirmed by the manner in which evidence is produced both in England and on the Continent. In England, witnesses are designated and called up by the parties, whilst on the Continent, although the witnesses may naturally be designated by the parties, the judge may also do so by virtue of his office; also, it is the judge who calls up the witnesses.

In England, the witnesses are questioned by means of cross-examination, 'the greatest legal engine ever invented for the discovery of the truth'.<sup>22</sup> On the Continent, however, the witnesses are questioned by the arbitrator, who may or may not do so on the basis of the questions put by the parties.<sup>23</sup>

Special mention must be made of the fact that in common law countries, the witnesses who are scheduled to appear in court are coached and tested by the lawyers before the hearing, which would obviously be unthinkable on the Continent.

As regards documents and other items of evidence, the common law countries apply the procedure known as the 'discovery of documents', under which it is possible to order the production of all documents which are in the possession of the other party and which relate to the dispute in question.<sup>24</sup> This amounts as it were to a duty to designate and communicate all the relevant documents.

No such obligation exists on the Continent – nevertheless, the arbitrator may well draw certain conclusions from any refusal to produce documents, and in some cases it will be possible to penalise such behaviour.<sup>25</sup>

In the common law, frequent use is made of expert witnesses, i.e. experts who provide the court with technical explanations. Such experts can also

<sup>21</sup> Lord ELDON, quoted by H. KÖTZ, 'The role of the Judge in the Courtroom, the Common Law and the Civil Law Compared, *T.S.A.R., Tijdskrif voor Suid-Afrikaans Reg*, 1987, p. 35 et seq., in particular p. 37.

<sup>22</sup> WIGMORE, *Evidence*, 1940, London, para. 1367, 29. For a detailed analysis of the hearing and cross-examination procedures, cf. W.H. GILL, 'United Kingdom', *Yearbook of Commercial Arbitration*, II, 1977, p. 90 et seq., in particular p. 103.

<sup>23</sup> However, in the event of any incidental pleas in the course of these proceedings, the arbitrator will, in Belgium, be compelled to refer the case to the ordinary courts; cf. Article 1696 Judicial Code.

<sup>24</sup> Cf. M. STORME, *De bewijslast in het Belgisch privaatrecht*, Gent, No. 254, 1962, p. 229–230.

<sup>25</sup> In Belgium, this can, for example, amount to compensation (Article 882 Judicial Code) and/or a daily fine called *astreinte* (Article 1385bis Judicial Code). See also the proposal on discovery made by the working group which under my chairmanship prepared a document for the European Commission on the approximation of Judiciary law: M. STORME (ed.), *Rapprochement du droit judiciaire en Europe/Approximation of Judiciary Laws in Europe*, The Hague, 1994.

be 'legal experts', i.e. lawyers giving advice in relation to certain problems which arise from the applicable law. Where, for example, it proves necessary to apply Egyptian law in the context of an international arbitration, it might be deemed necessary sometimes to use the services of Egyptian lawyers in order to explain the scope of a certain legal rule.

In such cases, the expert witnesses will be designated, called up and questioned by the parties.

This type of witness will be used less often in Continental arbitration proceedings. If it is decided to involve one such witness, the arbitrator will need to take the appropriate steps to bring this about, and will in most cases request a written report.

12. Earlier, we raised the question of the extent to which a decision must be reasoned (cf. *supra*). At present, it can fairly be stated that there is a strong trend in favour of reasoned decisions, which could, in addition, form the basis for a supranational system of law, i.e. the so-called *lex mercatoria*.<sup>26</sup>

There is a clear connection between the reasoning of a decision and the supervision exercised by the public authorities. As the latter decreases, so the arbitration panels will be increasingly prepared to disclose the reasons for their decisions.

However, it must be stressed that the reasoning of a decision is an important element in support of arbitration as an institution. Both the parties and – where the arbitration proceedings are published, which is, in my view, highly desirable<sup>27</sup> – third parties must be convinced by the arguments of the arbitrators, who will thus be able to justify their decisions.

13. It is also possible for the English courts to rectify the arbitrators' errors or, to use a more appropriate phrase, to refer a case back to the arbitrator in order that he may adopt an improved decision.<sup>28</sup> This would be unthinkable on the Continent, except for institutional arbitrations which are subject to a final formal supervision by the institution which monitors the arbitration proceedings. This is, for example, the case with the CCI/ICC in Paris, for which Article 21 of the applicable rules states:

Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court. The Court may lay down modifications

<sup>26</sup> For an extensive commentary on this issue, cf. F. DE LY, *De lex mercatoria*, Antwerpen, 1990.

<sup>27</sup> Cf. on this subject: J. LEW, "The Case for the Publication of the Arbitration Awards", in: *The Art of Arbitration*, Deventer, 1982, p. 223 et seq.

<sup>28</sup> *Mutual Shipping Corporation v. Bayshore Shipping Corporation*, 1985, 1 W.L.R.L. 615 C.A.

as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance. No award shall be signed until it has been approved by the Court as to its form.<sup>29</sup>

14. It is a fact that there exists a good deal of agreement on the question of accepting the proposition that arbitration decisions should not be subjected to any further supervision *as to their substance (on the merits)* on the part of the courts.

On the Continent, the most liberal approach has been adopted by Belgium, since Article 1717(4) of the Judicial Code states that the Belgian courts may only adjudicate on an application for annulment where at least one of the parties to the dispute on which an arbitration decision was made is a natural person of Belgian nationality, a natural person having his residence in Belgium or a legal person established in Belgium or having a subsidiary or a registered office in Belgium.<sup>30</sup>

In England, the 1979 Arbitration Act provides a limited right of appeal which concerns legal issues arising from the arbitration decision and which fundamentally affect the rights of the parties. This right of appeal may only be used with the agreement of the court, unless the parties have agreed among themselves that there should be a right of appeal.<sup>31</sup>

Particularly interesting is the fact that in international arbitration proceedings, the parties may conclude an 'exclusion agreement', i.e. agree that they should waive the right of appeal.

## Summarizing conclusions

15. An attempt could be made to derive a comprehensive summary from the above; however, this would be quite a difficult assignment, since the differences involved do not present a coherent and consistent whole. Moreover, there is currently in progress a remarkable development tending towards a network of arbitration systems the world over which evolve along similar lines, in the context of international arbitration. This process of 'continentalising' arbitration proceedings has, moreover, also been the outcome of the

<sup>29</sup> This monitoring process has, moreover, been accepted by the Belgian Cour de Cassation, cf. its decision of 8/12/1988.

<sup>30</sup> For a commentary of this provision, cfr. M. STORME & B. DEMEULENAERE, *International Arbitration in Belgium*, Deventer, 1989.

<sup>31</sup> Cf. on this subject: MUSTILL & BOYD, *The law and practice of commercial arbitration in England*, p. 555 et seq.

1958 New York Convention relating to the recognition and enforcement of foreign arbitral awards.<sup>32</sup>

(a) In Anglo-Saxon law, and particularly in England, there existed a good deal of mistrust towards arbitration, which in most cases was, and to a certain extent still is, reflected in the possibility of judicial review of arbitration decisions by the public courts.

This undoubtedly has its origins in the unique position occupied by the courts in the English legal system.

This unique place is in my view best illustrated by the manner in which the English judge expresses himself on the subject of the case before him, in which he has remained totally neutral prior to the decision. A perfect example is the *Errol Flynn* case, in which the opening statement by Lord Justice Megarry says:

Errol Flynn was a film actor whose performance gave pleasure to many millions. On June 20, 1909, he was born in Hobart, Tasmania; and on October 14, 1959, he died in Vancouver, British Columbia. When he was 17 he was expelled from school in Sydney; and in the next thirty-three years he lived a life which was full, lusty, restless and colourful. In his career, in his three marriages, in his friendships, in his quarrels, and in bed with the many women he took there, he lived with zest and irregularity. The lives of film stars are not cast in the ordinary mould; and in some respects Errol Flynn's was more stellar than most. When he died, he posed the only question that I have to decide: Where was he domiciled at the time of his death?<sup>33</sup>

(b) Paradoxically enough, however, it must be noted that in England, much more than on the Continent, there existed, and continues to exist, a large degree of co-operation between the public courts on the one hand, and the parties to arbitration proceedings on the other hand. This co-operation can assume a wide variety of forms, ranging from the sustaining to the discontinuation of arbitration proceedings, through the monitoring, rectification or annulment of intervening arbitration decisions.

To use a figure of speech, in England the public courts and the arbitrators are two captains on the same ship, whereas on the Continent, each governs

<sup>32</sup> Over 80 countries have acceded to this Convention. Further commentary on this subject can be found in: M. STORME & B. DEMEULENAERE, *International Commercial Arbitration in Belgium*, p. 113 et seq.

<sup>33</sup> *Re Flynn*, 1969 1 All ER 49, 50, quoted by H. KÖTZ, *T.S.A.R.*, 1987, p. 35 et seq., in particular p. 42.

his own ship; however, there are occasions on which the one must be piloted by the other.

In addition, it is necessary to highlight specifically the fact that in the course of history, and especially during the past few decades, there has developed a special relationship between the arbitrator and the public courts, which could perhaps best be described as a LAT-relationship (living apart together).

They are not in competition with each other – which would be impossible anyway since the contest would be an extremely unequal one – because in most cases they act in separate fields.

They have a good deal to learn from each other. Arbitrators must be as independent and impartial as the public courts, whereas the public courts could learn something by considering the type of ‘managerial justice’ which is applied in arbitration rulings.

They must co-operate. Where the parties in question, or third parties, prove to be recalcitrant, arbitrators need the public courts so that the latter may assist them, compel the parties to comply and render the arbitration ruling enforceable. In other words, although they act in separate domains, ultimately they cannot do without each other.

(c) Naturally, it remains a remarkable fact – and indeed, we are dealing here with proceedings as they are conducted in fact rather than with major differences of principle – that proceedings before the arbitrator are as typical as those before the ordinary courts; in England, this means that proceedings are on the slow side, oral and led by the parties.

Recently, an English practitioner – wrongly, in my view – rued the fact that in construction cases, the usual English procedure was being followed less and less frequently, and that in particular the hearings and the statements by the witnesses were being made subject to severe limitations.<sup>34</sup> However, the worst possible outcome in the opposite direction would be the cumulative application of the Continental and Anglo-Saxon procedures, since in this case we would be faced with protracted written and oral proceedings.<sup>35</sup>

(d) Here and there, it is possible to discern a clear trend towards a greater measure of autonomy in the case of arbitration proceedings, more particularly international arbitration. This liberalisation, i.e. a gradual process of emancipation from judicial control, has taken place and – again remarkably – found

<sup>34</sup> Cf. I.N. DUNCAN WALLACE, “Deficiencies in Current International Arbitration Practice in Construction Cases”, *Arb. int.*, 1991, p. 149 et seq.

<sup>35</sup> Cf. the example given in the Introduction.

its origins in England (1979), followed by France (1983), Belgium (1985), the Netherlands (1988) and Switzerland (1989).<sup>36</sup>

(e) Because international arbitration is becoming a unique instrument in the process of harmonising commercial law, there should be developed a kind of 'quality control',<sup>37</sup> which in my view should concern the following issues: the justification of arbitration decisions by extensive reasoning, a highly concentrated procedure in which the excesses of both the (continental) written procedure and of the (Anglo-Saxon) oral procedure would be avoided, co-operation between the public courts and the arbitrator, whose sole objective would be to give maximum effect to the arbitration decision.

It is clear that on this point, the common law and the continental law complement each other particularly well; all that is needed is to weed out the festering excesses and nurture new implantations.

16. There has occurred a phenomenal growth in international commercial arbitration, and this has revealed a number of trends which are important in relation to the differences between the common law and the civil law countries.

(a) There is a clear process of deregulation on the procedural side of arbitration proceedings which has been caused through both arbitration practice and legislation. It would be useless to try to discern any question of principle behind this phenomenon.

It is mainly a factor of a kind of arbitration consumerism which allows the users of these proceedings "to vote with their arbitration clauses".<sup>38</sup> Each country is attempting to attract arbitration to its territory by liberalising its arbitration legislation.

(b) Should the same law of arbitration apply everywhere, with the UNCITRAL Arbitration Rules<sup>39</sup> serving as a model?<sup>40</sup> Personally, I would not as yet be ardent advocate of such a process. It might be more appropriate, in the

<sup>36</sup> This explains why the choice of the country of arbitration is important: see M. STORME & F. DE LY, *The place of arbitration*, Gent, 1992.

<sup>37</sup> Here, I will leave aside the question of who should be called upon to monitor this quality as laid down in a code of conduct in arbitration proceedings: should this be left to a centre for international arbitration, an international court or a national public court or arbitration panel?

<sup>38</sup> Quoted in J. STEYN, *op. cit. Arb. Int.*, 1991, p. 25.

<sup>39</sup> This abbreviation stands for United Nations Commission on International Trade Law.

<sup>40</sup> Cf. H. STROHBACH, "Towards an International Arbitral Award", in *The art of arbitration*, p. 5.

context of the harmonisation of European procedural law,<sup>41</sup> to approximate international arbitration proceedings within the European Union.<sup>42</sup>

(c) In addition, the different legal systems which apply in Europe tend to be one of the enriching features of a multi-cultural Europe. Here, comparative law could be an engine in the process of improving and enhancing national law.

(d) In my view, the major breakthrough will occur elsewhere, i.e. in the development of a non-national and transnational law of arbitration which, provided that it observes certain fundamental principles of proper arbitration, would no longer be narrowly tied to national territories.

(e) Without wishing to engage in the debate surrounding the *Lex Mercatoria*, it can fairly be stated that, whatever form it may take, if it presents a fair arbitral trial (procedural law) on the one hand, and acknowledges generally accepted legal rules of proper conduct in international trade (substantive rules) on the other hand, the law of international arbitration can give an added ethical dimension to the *bona fide* activities of individuals and firms throughout the world.

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<sup>41</sup> The working group (Approximation of judiciary Law in Europe) of which I was privileged to be the chairman has not decided to place the issue of arbitration on its agenda. Nevertheless this would appear desirable since arbitration does not come within the EEC Treaty; for an extreme case of this non-applicability, cf. ECJ decision of 25/7/1991, *Marc Rich v. Societa Italiani Impianti*.

<sup>42</sup> See also my report in *Approximation of Judiciary Laws in Europe/Rapprochement du droit judiciaire en Europe*, *op. cit.*, p. 34.